

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Investigation of Tariffs Filed by)	CC Docket No. 02-36
ACS of Anchorage, Inc. and)	
the National Exchange Carrier Association)	
)	
December 17, 2001)	CCB/CPD No. 01-23
MAG Access Charge Tariff Filings)	

**OPPOSITION OF GENERAL COMMUNICATION, INC.
TO THE DIRECT CASE OF ACS OF ANCHORAGE, INC.**

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General Communication, Inc. (“GCI”), by its undersigned attorneys, hereby opposes the Direct Case of ACS of Anchorage, Inc. (“ACS”), filed on March 21, 2002.

I. INTRODUCTION AND SUMMARY

On January 24, 2001, the Commission found that ACS’ practice of assigning the traffic-sensitive costs of ISP-bound traffic to the interstate jurisdiction is unlawful.¹ Requiring that ACS cease its unlawful practice, the Commission expressly directed ACS to allocate the costs of carrying ISP traffic to the intrastate jurisdiction for separations purposes from January 1, 1999 forward. Following that order, ACS *took no action* to revise its traffic-sensitive interstate access rates until December 17, 2001, when ACS filed a revised tariff as required by all rate-of-return carriers to implement rate structure reforms adopted in the Rate-of-Return Access Charge Reform Order.² However, even in

¹ General Communication, Inc. v. Alaska Communications Systems, Inc., 16 FCC Rcd 2834 (2001) (“GCI Order”), on appeal ACS v. FCC, No. 01-1059 (D.C. Cir.).

² Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, Second Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 19613 (2001) (“Rate-of-Return Access Charge Reform Order”).

that tariff filing, ACS failed to comply with the Commission's prior mandate that ACS exclude ISP costs from the interstate jurisdiction.

GCI petitioned the Commission to suspend and investigate the ACS MAG Access Tariff Filing demonstrating that the filing raised significant questions of lawfulness because: (1) the tariff filing is not revenue neutral as ACS stands to collect an additional \$2.6 million from the assignment of line port costs to common line with no corresponding offset in the local switching rate; (2) ACS has not "removed" line port costs from local switching in an amount equivalent to what NECA has assigned to common line on ACS behalf; (3) the tariff filing was developed based on a July 2000-June 2001 prospective cost study and not calendar year 2000 dial equipment minute ("DEM") factors; (4) ACS continues to assign ISP-bound minutes to the interstate jurisdiction in violation of a direct Commission order; (5) ACS continues to maintain rates that have consistently generated significant overearnings for the past six years; and (6) ACS continues to assign ISP costs to the intrastate jurisdiction in its filings with the Regulatory Commission of Alaska, so that its simultaneous assignment of the same ISP costs to both jurisdictions permits double-recovery.³ Finding that the ACS tariff filing raised substantial questions of lawfulness, the Commission suspended the tariff and instituted the instant investigation.⁴

In its Direct Case, ACS readily concedes that the baseline revenue requirement for "its January 2002 Tariff . . . treats the traffic sensitive costs of ISP-bound traffic as

³ See Petition of GCI to Suspend and Investigate, CCB/CPD No. 01-23 (filed Dec. 21, 2001); see also Petition of AT&T Corp. to Suspend and Investigate, CCB/CPD No. 01-23 at 10-13 (filed Dec. 26, 2001).

⁴ December 17, 2001 MAG Access Charge Tariff Filings, CCB/CPD No. 01-23, Order, DA 01-3023 at ¶ 7, Erratum, DA 01-3032 (Comp. Pric. Div. rel. Dec. 31, 2001) (together, "Suspension Order").

interstate.”⁵ ACS has failed to demonstrate, however, that its continued assignment of ISP costs to the interstate jurisdiction is permissible under any Commission order, regulation, or policy, that it is not already recovering these same costs in the intrastate jurisdiction, or that its MAG Access Tariff Filing complied with the Commission’s requirement that implementation of rate structure reforms be revenue neutral. Stated simply, the ACS MAG Access Tariff Filing does not comply with the Rate-of-Return Access Charge Reform Order or the GCI Order, the rates filed therein are significantly overstated, and they are unlawful. For these reasons, the ACS interstate access rates must be rejected and revised to comply with both the Rate-of-Return Access Charge Reform Order and the GCI Order.

II. ACS EMPLOYED AN UNLAWFUL BASELINE REVENUE REQUIREMENT IN ITS MAG ACCESS TARIFF FILING

ACS’ use of the July 2000 Tariff baseline revenue requirement for its MAG Access Tariff Filing directly contravenes the Commission’s standing order to allocate the costs of ISP traffic to the intrastate jurisdiction and is unlawful. Defending its use of this revenue requirement, ACS states that it “was instructed” to use the same cost study as for the July 2000 Tariff by the Rate-of-Return Access Charge Reform Order and the MAG Tariff Filing Order.⁶ In filing and defending the resulting rates, however, ACS utterly ignores that prior to either of those orders, the Commission specifically “instructed” ACS in the GCI Order to “allocate to the intrastate jurisdiction for separations purposes the traffic-sensitive costs of carrying ISP traffic from January 1, 1999 forward, until

⁵ Direct Case of ACS of Anchorage, Inc., CC Docket No. 02-36 at 7 (filed Mar. 21, 2002) (“ACS Direct Case”).

⁶ Id. at 8.

otherwise ordered by the Commission.”⁷ Indeed, even ACS submitted a subsequent cost study to NECA that complied with the GCI Order, demonstrating that its current arguments are merely a subterfuge for its continuing violation. Moreover, ACS’ current arguments do not explain why ACS continues to recover ISP costs from both the interstate and intrastate jurisdictions. These illegalities can only be cured by removing ISP costs from the baseline revenue requirement.

A. ACS Ignored the Commission’s Direction to Assign ISP Costs to the Intrastate Jurisdiction for Separations Purposes

ACS readily admits that the baseline revenue requirement for “its January 2002 Tariff is based on the cost study supporting its July 2000 Tariff, which treats the traffic sensitive costs of ISP-bound traffic as interstate.”⁸ ACS cites the Rate-of-Return Access Charge Reform Order and the MAG Tariff Filing Order in support of this blatant disregard for the Commission’s mandate in the GCI Order that ACS assign the traffic-sensitive costs of ISP-bound traffic to the intrastate jurisdiction.⁹ ACS does not claim that the cost assignment employed to develop the baseline revenue requirement for the January 2002 Tariff Filing itself is permitted, but that in using the July 2000 cost study, ACS simply “followed the Commission’s instructions” in these orders.¹⁰ This is not true. By failing to remove ISP costs, ACS did not “follow” but instead expressly violated the Commission’s direction as to how the ISP costs must be allocated for separations

⁷ See GCI Order, 16 FCC Rcd at 2836 (¶ 2); id. at 2864 (¶ 79).

⁸ ACS Direct Case at 7.

⁹ This mandate was not stayed, and the GCI Order remains in full force and effect. See General Communication, Inc. v. Alaska Communications Systems, Inc., Memorandum Opinion and Order, 16 FCC Rcd 8169 (2001) (“Stay Order”). The Commission expressly noted when granting that stay that ACS was still obligated “to allocate to the intrastate jurisdiction for separations purposes the costs of carrying [ISP] traffic.” Id.

¹⁰ ACS Direct Case at 8.

purposes, including cost studies.¹¹ As a result, ACS continues to “increase[] the interstate access rates that GCI ha[s] to bear as ISP traffic increase[s]” by continuing to assign ISP costs to the interstate jurisdiction to justify its interstate access rates.

The baseline revenue requirement on which ACS’ MAG access tariff filing is based violates both the Commission’s generally applicable orders that carriers assign the cost of ISP-bound traffic to the intrastate jurisdiction and the Commission’s express mandate that ACS change its unlawful practice of assigning these costs to the interstate jurisdiction. The Commission “has made clear that local exchange carriers *must* assign ISP traffic costs to the intrastate jurisdiction for separations purposes.”¹² In the GCI Order, the Commission specifically found that ACS’ practice of assigning ISP costs to the interstate jurisdiction violates “valid Commission orders that the Commission had jurisdiction to issue and that are consistent with separations principles and rules.”¹³

When ACS “reclassified ISP traffic costs from the intrastate jurisdiction to the interstate jurisdiction for separations purposes, [it] increased the traffic sensitive costs apportioned to the interstate jurisdiction,”¹⁴ and in doing so, ACS “increased the interstate access rates that GCI had to bear as ISP traffic increased.”¹⁵ To address the violation, twice in the GCI Order the Commission unambiguously directed ACS to “assign to the intrastate jurisdiction for separations purposes the traffic-sensitive costs of carrying ISP traffic,”

¹¹ ACS apparently could have made the same adjustments to its July 2000 cost study that it did for filing with its Direct Case to develop its MAG Access Tariff Filing. See id. at n.32, Attachment G & Attachment H.

¹² GCI Order, 16 FCC Rcd at (¶ 22) (emphasis in original).

¹³ Id. at 2850 (¶ 39); see also id. at 2840-50 (¶¶ 16-39).

¹⁴ Id. at 2842 (¶ 18). As illustrated by ACS’ 2001 cost study filed with the Regulatory Commission of Alaska for intrastate purposes, ACS never “reclassified” the ISP traffic as interstate; it simply included it in *both* jurisdictions.

¹⁵ Id.

and to do so “until further ordered otherwise by the Commission.”¹⁶ The Commission has issued no order to the contrary,¹⁷ and certainly did not do so in the Rate-of-Return Access Charge Reform Order or MAG Tariff Filing Order, on which ACS relies in an attempt to justify its continuing non-compliance with the GCI Order.

As an initial matter, ACS claims that in the Rate-of-Return Access Charge Reform Order, the Commission adopted a requirement for revenue neutrality that “required” ACS to maintain the cost allocation that the Commission found was unlawful in the GCI Order. ACS purports to find support for this position in the Commission’s statement that “the rate structure modifications we adopt do not affect the overall recovery of interstate access costs.”¹⁸ This single Commission statement, however, issued in the introduction to the order,¹⁹ does not mandate the result that ACS seeks — that ACS is required to violate the express direction in the GCI Order to remove ISP costs from the interstate jurisdiction. Nowhere in the Rate-of-Return Access Charge Order did the Commission conclude that “revenue neutrality” requires guaranteed recovery of exactly the same total revenues — particularly revenues secured through unlawful practices — as ACS suggests. Rather, the reforms adopted are designed to ensure that

¹⁶ GCI Order, 16 FCC Rcd at 2864 (¶ 79); id. at 2836 (¶ 2).

¹⁷ In fact, the Commission has subsequently issued at least two orders affirming that carriers are not permitted to recover traffic-sensitive ISP costs from the interstate jurisdiction. See 2001 Annual Access Tariff Filings, Memorandum Opinion and Order, 16 FCC Rcd 21519 (2001) (“2001 Annual Access Tariff Order”) (rejecting Alltel’s DEM calculation adjustment for ISP calls); Jurisdictional Separations and Referral to the Federal-State Joint Board, Report and Order, 16 FCC Rcd 11382, 11399-403 (¶¶ 34-42) (2001) (“Jurisdictional Separations Order”) (rejecting proposal to adjust interstate DEM for ISP traffic prior to DEM freeze).

¹⁸ ACS Direct Case at 5 (quoting Rate-of-Return Access Charge Reform Order, 16 FCC Rcd at 19620 (¶ 12)).

¹⁹ While ACS dismisses its specific obligation to allocate the traffic-sensitive costs of ISP-bound traffic to the intrastate jurisdiction “from January 1, 1999 forward” because the quoted language “does not appear in the Ordering Clauses, but in a summary of the decision” (id. at 9), ACS apparently is comfortable excusing its failure to comply with the GCI Order based on general statements in the introduction to the Rate of Return Access Charge Reform Order.

any *legitimate* interstate costs that are “removed” from an access rate element will be shifted to one or more other rate elements for recovery.²⁰ This is plainly a different notion altogether from ACS’ far-fetched claim that by adopting access rate structure reforms for rate-of-return carriers, the Commission tacitly permitted ACS to base its subsequent revised tariff on an unlawful baseline revenue requirement. The Rate-of-Return Access Charge Reform Order simply does not justify — either expressly or by implication — ACS’ continuing violation of the GCI Order.

The same is true of the MAG Tariff Filing Order. Under no construction of administrative law does the MAG Tariff Filing Order supercede the Commission’s express direction to ACS to comply with the Commission’s cost allocation requirements for separations purposes. The MAG Tariff Filing Order “establishe[d] procedures for the filing of access charge tariffs by incumbent local exchange carriers (ILECs) subject to rate-of-return regulation pursuant to the MAG Order.”²¹ As such, this procedural order established the process by which over 1,300 rate-of-return carriers would file tariffs in compliance with the Rate-of-Return Access Charge Order. In doing so, the Commission directed carriers to base calculations for the filing “on demand data used in the last annual tariff filing made by the carrier,” which requirement was designed to ensure that filings would be revenue neutral.²² Nothing in the MAG Tariff Filing Order, however, grants leave to violate a pre-existing mandate to correct unlawful practices or to continue

²⁰ See Rate-of-Return Access Charge Reform Order, 16 FCC Rcd at 19654 (¶ 90) (adopting proposal to “reallocat[e] line port costs from local switching to the common line category”), 19656 (¶ 98) (adopting proposal to eliminate the TIC as a separate rate element and reallocate costs “to all of the access categories”).

²¹ December 17, 2001, MAG Access Charge Tariff Filings, CCB/CPD 01-23, Order, DA 01-2748 (Comp. Pric. Div. rel. Nov. 26, 2001) at ¶ 1 (“MAG Tariff Filing Order”).

²² Id. at ¶ 3.

committing an ongoing violation of Commission regulations.²³ Plainly, if the Commission had intended such an outcome, it would have said as much, and it cannot be charged to have overruled the GCI Order *sub silentio*.²⁴

Indeed, that ACS had not already filed a tariff based on compliant cost allocation is entirely ACS' own doing. ACS chose not to make an annual filing in June 2001, though ACS admits that it prepared a cost study for NECA's July 2001 common line annual filing, in which ACS participates. At the very least, therefore, ACS should have reflected the required cost allocation in the January 2002 Tariff Filing, the first it directly filed since the Commission issued the mandate. It would be an odd result indeed if, in spite of the Commission's direction in the GCI Order to allocate ISP costs correctly, ACS could avoid the effect of that order entirely by first declining to file a corrected tariff and then seeking to benefit from that failure by carrying over the illegal tariff in the MAG access tariff filing. Yet, that is exactly the result ACS urges the Commission to reach.

²³ In this regard, ACS' argument ignores the fundamental requirement that carriers comply with the Commission's rules until such time as they are repealed or amended. See 47 U.S.C. § 408 (providing that Commission orders remain effective and must be complied with absent another Commission or court order altering the requirement for compliance); 5 U.S.C. § 553. Indeed, each tariff filing must reflect full compliance with prior Commission orders and policies. See AT&T, Revision of Tariff FCC No. 260, Private Line Series, Series 7000 (Television Transmittal, Transmittal No. 12793, Memorandum Opinion and Order, 67 FCC 2d 1134, 1157 (¶ 80) (1978) (holding that failure to comply with Commission orders, policies, or prescriptions may warrant rejecting a tariff as a "patent nullity as a matter of substantive law"), recon. denied, 70 FCC 2d 2031, 2039 (¶ 14) (1979) ("If we were not to enforce our own orders through tariff rejection, the result would be a waste of both our and the other parties' resources."). Indeed, ACS itself acknowledges that the January 2002 Tariff Filings would be revenue neutral only "insofar as is practical."

²⁴ ACS' argument also turns the generally applicable principle that "the specific governs the general" on its head. See Metropolitan Fiber Systems/New York, Inc., Election of Open Video System Option and Motion for Extension of Time to Complete Open Video System Transition, Consolidated Order, 12 FCC Rcd 3536, 3548 (¶ 23) (Cab. Serv. Bur. 1997) ("we cannot reconcile MFS' argument that it did not need a Section 214 authorization to be considered an authorized video dialtone provider in view of the repeated, express statements of the Commission regarding the necessity of Section 214 authorization for video dialtone"); id. at 3448-49 & n.71 (citing rules of statutory construction that "where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of the enactment") (citation omitted).

ACS next attempts to justify its disregard for the cost allocation mandate in the GCI Order by claiming that the mandate applies only for monitoring earnings.²⁵ This argument, however, cannot be squared with the plain language of the Commission's GCI Order or with ACS' own actions following that order. As ACS admits, the Commission ordered *three* distinct forms of relief in granting GCI's complaint: (1) it ordered ACS to pay damages; (2) it ordered ACS to file a revised 1997-1998 Monitoring report, and (3) it ordered ACS, "until further ordered by the Commission," to "(i) assign to the intrastate jurisdiction for separations purposes the traffic-sensitive costs of carrying ISP traffic, and (ii) count DEMs for intraoffice calls in the manner specified [in the order]."²⁶ ACS, however, blurs the distinction between the second and third forms of relief ordered when it claims that the requirement to assign ISP costs to the intrastate jurisdiction for separations purposes "appears to refer only to ACS's computation of earnings in its monitoring report."²⁷ ACS does not cite to any such limitation on the Commission's mandate because no such support exists. Indeed, the mandate on its face requires that ACS assign the traffic-sensitive costs of ISP traffic to the intrastate jurisdiction "for separations purposes," which plainly includes any jurisdictional cost studies.²⁸

Underscoring the improbability of ACS' new-found interpretation of the GCI Order, *ACS itself has not followed the very interpretation that it now proposes*. ACS admits that its own most recent demand data is not from its July 2000 Tariff filing cost

²⁵ ACS Direct Case at 9.

²⁶ GCI Order, 16 FCC Rcd at 2864 (¶ 79).

²⁷ ACS Direct Case at 9.

²⁸ Of course, the "limitation" suddenly identified by ACS would produce the nonsensical result that ACS would be required to report its earnings consistent with the Commission's ISP cost allocation requirements, but permitted to develop tariffs in violation of the same requirement.

study, but “a cost study ACS submitted to NECA in March, 2001.”²⁹ ACS prepared this cost study “in compliance with the GCI Order” and in the cost study, “treated the traffic-sensitive costs of ISP-bound traffic as *intrastate*.”³⁰ Plainly, ACS need not have prepared such a cost study if the cost allocation mandate in the GCI Order “refer[red] only to ACS’s computation of earnings in its monitoring report,” as ACS now claims. ACS’ preparation of a revised study for the July 2001 NECA common line tariff clearly demonstrates that ACS was well aware of its ongoing obligation to allocate costs of ISP-bound traffic in compliance with the GCI Order, and that its current arguments to the contrary are without merit. Indeed, it appears that the more recent ACS cost study provided to NECA would have been an appropriate basis for ACS’ MAG access tariff filing.³¹

Finally, ACS claims that the Jurisdictional Separations Order “has no bearing” on the lawfulness of its baseline revenue requirement because “the order does not itself contain a directive” to treat the traffic-sensitive local switching costs for ISPs as intrastate for separations purposes.³² To the contrary, the Jurisdictional Separations Order only underscores that ACS was not at liberty to rely on a baseline revenue requirement that was developed using unlawful cost allocation factors. In that order, the Commission considered and rejected a proposal to adjust DEM factors for ISP traffic minutes before it

²⁹ ACS Direct Case at 15.

³⁰ Id. (emphasis in original).

³¹ It is not clear whether that the March 2001 cost study submitted to NECA complies with the DEM freeze adopted in the Jurisdictional Separations Order. ACS states the study contains “projected demand data for tariff year 2001,” but the Jurisdictional Separations Order required that frozen DEM factors based on annual 2000 demand data be used as of the July 2001 annual tariff filings.

³² Id. at 10.

froze the interstate DEM factors.³³ Indeed, the Commission expressly relied on the GCI Order, stating, “The Commission has directed carriers to treat the traffic-sensitive local switching costs that ISPs incur through their connections to LEC end-offices as intrastate for separations purposes, because these switching costs are recovered through intrastate business tariffs, and enhanced service providers such as ISPs are exempt from paying carrier access charges.”³⁴ Having utterly ignored the Commission’s standing cost allocation requirements, the GCI Order, and the Jurisdictional Separations Order, it is not clear what magic words from the Commission will constitute a “directive” with which ACS might actually comply.

At bottom, neither the Rate-of-Return Access Charge Reform Order nor the MAG Tariff Filing Order either expressly or tacitly condoned ACS’ ongoing violation of the Commission’s cost allocation requirements, which the Commission expressly directed ACS to correct in the GCI Order. There was nothing “extraordinary,” as ACS argues,³⁵ about the Commission’s general direction to over 1,300 rate-of-return carriers to use their most recent demand data to develop their MAG access tariff filings. ACS was already subject to the Commission’s direction to “assign to the intrastate jurisdiction for separations purposes the traffic-sensitive costs of carrying ISP traffic,” and the Commission’s Rate-of-Return Access Charge Reform Order and the MAG Tariff Filing

³³ The Joint Board had proposed to reduce the local DEM to shift some ISP traffic costs to the interstate jurisdiction, but because no party could identify any verifiable estimates of ISP traffic data, the Commission did not disturb its standing requirement that all ISP traffic costs are “booked as intrastate.” Jurisdictional Separations Order, 16 FCC Rcd at 11399-00 (¶ 35), 11401-02 (¶¶ 38-40).

³⁴ Id. at 11402 (¶ 39) (citing GCI Order, 16 FCC Rcd 2834).

³⁵ See ACS Direct Case at 7 (“the Commission took the extraordinary step of requiring a tariff filing, not based on cost studies that comply with current rules, but based on cost-studies performed under the Commission’s rules as they existed in June, 2000”). But, when the Rate-of-Return Access Charge Reform Order and the MAG Tariff Filing Order were issued, ACS was already required to allocate ISP costs to the intrastate jurisdiction in compliance with the Commission’s long-standing policies and in compliance with the GCI Order.

Order did nothing to interrupt the effectiveness of that mandate. Indeed, the only extraordinary aspect of this investigation is that ACS would profess any doubt about its obligation to follow a clear, direct Commission mandate. As a result of ACS' failure to abide by that mandate, however, ACS based the rates in its MAG Access Tariff Filing on an unlawful baseline revenue requirement.

B. ACS Itself Departed from its July 2000 Baseline Revenue Requirement in Reporting Costs to NECA for the January 2002 Tariff Filing

Though ACS now argues strenuously that it was "required" to rely on the baseline revenue requirements from the July 2000 Tariff cost study, ACS plainly departed from that cost study when it reported revenue requirements to NECA for its non-traffic sensitive January 2002 Tariff Filing that complied with the GCI Order. For traffic-sensitive rate elements, ACS determined the amount of line-port costs it would "shift" from its switching revenue requirement to the NECA common line revenue requirement by using the Commission's "30 percent proxy" for line-port costs.³⁶ As a result, ACS multiplied its switching revenue requirement reported in the July 2000 Tariff filing cost study (\$8,614,663) by 30 percent to produce its line-port proxy amount of \$2,584,432.³⁷ This amount apparently differed, however, from the amount ACS reported to NECA for NECA to employ in determining the revenue requirement for its common line tariff. In the D&J, ACS claimed that

ACS-AN and NECA used different cost study periods in calculating the impact of the allocation of line port costs to the common line category. Consequently, NECA's allocation of line port switching costs to common line is less than the adjustment amount reported by ACS-AN.³⁸

³⁶ Id. at 15.

³⁷ Id.

³⁸ ACS of Anchorage, Inc., Tariff FCC No. 1, Transmittal No. 6, Description and Justification ("D&J") at 10 n.6 (filed Dec. 17, 2001) ("ACS MAG Access Tariff Filing") (emphasis added).

Thus, in the Order Designating Issues for Investigation, the Commission directed ACS to “indicate the line-port costs it reported to NECA to be used in NECA’s tariff development for its December 17 common line tariff filing.”³⁹

As set forth in Attachment F to the ACS Direct Case, ACS reported quite a different line port proxy amount to NECA. ACS reported \$1,501,194 in line port costs to NECA “to be used in NECA’s tariff development for its December 17 common line tariff filing.”⁴⁰ Given that ACS calculated line port costs to be 30 percent of the local switching revenue requirement, ACS’ report to NECA is based on a switching revenue requirement of \$5,003,980. This revenue requirement is *\$3,610,683 less than* the switching revenue requirement from the July 2000 Tariff filing cost study that ACS used in its own filing.⁴¹ This difference is not merely a result of using a “different cost study period,” as ACS averred in its tariff filing, but reflects the removal of ISP costs.

ACS’ plainly departed from its July 2000 baseline revenue requirement, developing a baseline revenue requirement to report to NECA in accordance with the GCI Order. Thus, even ACS knew that it was not “required . . . to submit a revenue neutral tariff by using . . . the July 2000 Tariff.”⁴² That ACS employed two different cost studies in preparing its submissions as a result of the Rate-of-Return Access Charge Reform Order and the MAG Tariff Filing Order demonstrates that ACS was not bound to use its July 2000 Tariff filing cost study to the extent that it did not comply with the GCI

³⁹ Order Designating Issues for Investigation at ¶ 16.

⁴⁰ ACS Direct Case, Attachment F.

⁴¹ ACS reports a recalculated switching revenue requirement of \$5,488,974. Id., Attachment G at 1.

⁴² Obviously, NECA would not accept a revenue requirement calculated in plain violation of the GCI Order, and yet, that is what ACS expected the Commission to do.

Order and that ACS indeed had a more current — and allegedly compliant — cost study from which it should have developed a baseline revenue requirement for traffic-sensitive elements in its MAG Access Tariff Filing.

C. ACS’ Baseline Revenue Requirement Causes an Unlawful Double Recovery of ISP and UNE Costs

ACS’ baseline revenue requirement is also unlawful because it perpetuates double recovery of costs. At the same time that ACS assigns ISP costs to the interstate jurisdiction for recovery from IXC’s through access charges, ACS assigns these same costs to the intrastate jurisdiction for recovery from ISPs through local business rates in its local tariff. Because ACS recovers these costs from ISPs who purchase the service from ACS’ local tariff, ACS’ inclusion of these same costs in its baseline revenue requirement for interstate access charges — from which ISPs are exempted — will cause an unlawful double recovery of ISP costs. This practice goes beyond ACS’ disingenuous claim that it was “instructed” by the Rate-of-Return Access Charge Reform Order and the MAG Tariff Order to violate the GCI Order. Rather, this activity rises to the level of fraud where ACS has been betting that regulators in Washington, D.C. and Anchorage, Alaska will never compare interstate and intrastate cost studies and realize that ACS is recovering the ISP costs in both jurisdictions.

This unlawful double recovery is plainly illustrated in ACS’ interstate and intrastate filings. On June 16, 2000, ACS filed its 2000 Annual Access Tariff Filing. In the cost support accompanying that filing, ACS reported the following DEM factors for allocating costs across the interstate, intrastate, and local jurisdictions:

Interstate Toll	21.8%
Intrastate Toll	4.5%
Local	73.7% ⁴³

ACS developed these DEM allocation factors with “all identifiable Internet Service Provider (ISP) traffic” counted as interstate.⁴⁴

At the same time, ACS has sponsored a cost study with the Regulatory Commission of Alaska, seeking to justify an increase in local rates. In that study, ACS reported *significantly different* DEM factors for allocating costs across the interstate and local jurisdictions over the same time period:

Interstate Toll	12.7%
Intrastate Toll	4.7%
Local	82.6% ⁴⁵

The interstate DEM allocation factor in the interstate cost study (21.8%) is significantly higher than in the intrastate cost study (12.7%) due to the classification of ISP minutes as *interstate* for recovery in the interstate jurisdiction. The local DEM allocation factor in the intrastate cost study (82.6%) is significantly higher than in the interstate cost study (73.7%) due to the classification of ISP minutes as *local* for recovery in the local

⁴³ ATU Tariff F.C.C. No. 5, Transmittal No. 108, Cost Support at S-4, l.13 (filed June 16, 2000) (“July 2000 Tariff Filing”).

⁴⁴ *Id.*, Description and Justification at 14.

⁴⁵ Direct Case of ACS, Attachment E at 4, l.13. Notably, ACS’ intrastate toll DEM factor remained consistent between the two cost studies. This result is consistent with ACS’ manipulation of ISP costs between the interstate and local jurisdictions. ACS includes the ISP costs in the local jurisdiction for its intrastate cost study, and it includes these same costs in the interstate jurisdiction for its interstate cost study.

jurisdiction.⁴⁶ Indeed, the DEM allocation factors used for ratesetting purposes yields recovery of costs in excess of ACS' total company costs, or greater than 100%:

Interstate Toll	21.8% (from interstate cost study)
Intrastate Toll	4.7% (from intrastate cost study)
<u>Local</u>	<u>82.6% (from intrastate cost study)</u>
Total	109.1%

Thus, ACS plainly recovers the costs of carrying ISP traffic in *both* jurisdictions.

Though ACS has argued that its allocation of ISP costs to the interstate jurisdiction is required by the Commission's rules,⁴⁷ ACS has not taken any steps to eliminate ISP costs from the local jurisdiction or to develop interstate rates that also include ISP minutes in demand. ACS' sole action has been to assign ISP costs simultaneously to both the interstate and local jurisdictions, an action that cannot be justified under any legal interpretation. Because ACS does not charge ISPs any rates from its interstate access service tariff, its inclusion of costs for such services in its MAG tariff filing produced unlawful baseline revenue requirements, which must be revised.

Finally, different treatment of UNE costs and revenues between ACS' interstate and intrastate cost studies will also result in double recovery. According to ACS, it "now directly assigns all UNE loop costs and revenues to the intrastate jurisdiction."⁴⁸ In the intrastate jurisdiction, any difference between the UNE rates and embedded costs is fully recovered directly in the intrastate jurisdiction. As for the interstate cost study, ACS states that it "did not subject either the costs or the revenues associated with UNE loops

⁴⁶ All differences in DEM factors between the interstate and intrastate cost study appear to be entirely resolved when ISP costs are excluded from the interstate jurisdiction. Compare id., Attachment A at 4, line 13 (DEM for interstate cost study with ISP minutes as local and intraoffice calls counted as two DEM) with id., Attachment E at 4, line 13 (same DEM for intrastate filing in Docket U-01-82).

⁴⁷ See Brief of Petitioner ACS of Anchorage, Inc., No. 01-1059 at 26-33 (filed Oct. 15, 2001).

to separations at all” and “removed these costs and revenue prior to performing jurisdictional separations.”⁴⁹ Though ACS has failed to explain how it “removed these costs,” it appears that ACS does so by offsetting UNE related expense accounts with UNE rent revenue. This method would leave any difference between the UNE rate and the embedded cost in the cost study, so that these costs will be allocated among jurisdictions in the separations process. Because a portion of these costs will be allocated to the interstate jurisdiction, ACS would recover that portion of the difference between UNE rates and embedded costs from the interstate jurisdiction, at the same time that it is already recovering the entire difference through its direct assignment in the intrastate jurisdiction. The Commission must ensure that double recovery through different treatment of UNE costs and revenues in the interstate and intrastate costs studies do not occur.

III. ACS’ REALLOCATION OF LINE PORT COSTS IS NOT REVENUE-NEUTRAL UNDER ANY THEORY

The Rate-of-Return Access Charge Reform Order required ACS to reallocate line port costs from the local switching revenue requirement to the common line revenue requirement, either in accordance with a carrier-specific study or by shifting 30 percent of its local switching costs to the common line category.⁵⁰ As a result, “[t]his tariff filing should be a revenue neutral tariff filing.”⁵¹ Thus, at a minimum, ACS should have decreased its switching rate to reflect this 30 percent reduction. ACS, however, made no

⁴⁸ ACS Direct Case at 12-13.

⁴⁹ Id. at 12.

⁵⁰ Rate-of Return Access Charge Reform Order, 16 FCC Rcd at 19654 (¶ 90).

⁵¹ MAG Tariff Filing Order at ¶ 3.

adjustment to its local switching rate, maintaining it at \$0.011373.⁵² At the same time, it sought from NECA an increase in common line recovery of \$1,501,194,⁵³ and now has changed its claim to \$2,584,432.⁵⁴ The plain inconsistency between ACS' demand for an additional \$2.6 million in cost recovery for line port costs, with no corresponding reduction in the local switching rate, and its claim that it was "required" to use its July 2000 baseline revenue requirements to ensure a "revenue neutral" tariff filing demonstrates that ACS' steadfast failure to comply with the GCI Order is untenable.

As a threshold matter, the Commission's expectation that the shift in line port costs from local switching to common line would be revenue neutral does not justify ACS' use of an unlawful switching revenue requirement to calculate its line port costs. ACS employed an inflated switching revenue requirement that includes the traffic-sensitive costs of ISP-bound traffic. Thus, when ACS estimated its line port costs as 30 percent of that inflated switching revenue requirement, ACS reported in its MAG Access Tariff Filing line port costs of \$2,584,432.⁵⁵ In contrast, ACS reported line port costs of \$1,501,194 to NECA for inclusion in its common line revenue requirement. This difference appears to be attributable solely to ACS' use of two different cost studies in preparing its MAG tariff filing submissions (to the Commission and to NECA), and specifically, ACS' exclusion of ISP costs from the switching revenue requirement in its March 2001 cost study filing with NECA (and failure to exclude ISP costs from the switching revenue requirement developed for its July 2000 cost study). Thus, for ACS'

⁵² ACS MAG Access Tariff Filing, D & J at 6.

⁵³ See Direct Case of National Exchange Carrier Association, CC Docket No. 02-36 at Exhibit 1, col. E (expressed as \$750,957 for a six-month revenue requirement) (filed Mar. 28, 2002) ("NECA Direct Case").

⁵⁴ ACS Direct Case at 15.

⁵⁵ ACS MAG Access Tariff Filing, Cost Support, Exhibit 1.

line port reallocation to be revenue neutral between the amount shifted from the local switching revenue requirement to the common line revenue requirement, the Commission must require that ACS employ the same local switching revenue requirement that produced the line port costs that ACS reported to NECA.

Notably, when required to explain the discrepancy between the line port costs reported in ACS' own filing and those it reported to NECA, ACS attempted to disavow its own filings to NECA that plainly complied with the GCI Order. ACS now claims that, by including only \$1,501,194⁵⁶ for line port cost recovery in the NECA common line revenue requirement — *the amount that ACS itself reported to NECA* — NECA has shorted ACS by \$1,083,238.⁵⁷ Thus, ACS is now claiming an additional \$2,584,432 in line port costs *with no reduction whatsoever in its local switching rate*. This latest claim merely underscores the implausibility of ACS' position that it was "required" to use the July 2000 Tariff filing cost study,⁵⁸ and demonstrates that the only permissible line port costs and corresponding local switching requirement are those that ACS reported to NECA, which appear to comply with the GCI Order.

ACS submitted a cost study to NECA in March 2001 "for use in preparing NECA's common line pool tariff filed to take effect on July 1, 2001" following the GCI Order, in which ACS "treated the traffic-sensitive costs of ISP-bound traffic as *intrastate*," and ACS subsequently submitted to NECA line port costs that were apparently based on the switching revenue requirement produced in that same cost

⁵⁶ ACS Direct Case, Attachment F.

⁵⁷ Id. at 15-16; see NECA Direct Case, Exhibit 1, col. E (reporting six months of line port revenue requirement).

⁵⁸ See ACS Direct Case at 11.

study.⁵⁹ ACS now seeks to disavow that filing with NECA and return to the ACS June 2000 Tariff filing cost study, in which ACS still treated the traffic sensitive costs of ISP-bound traffic as interstate. This latest ACS ploy is not designed to ensure “revenue neutrality,” but to permit ACS to perpetuate its unlawful cost allocation and the resulting rates. At bottom, in the absence of any reduction in the local switching rate, ACS’ line port cost reallocation — at any dollar amount — fails the Commission’s revenue neutrality standard. ACS itself relied on the switching revenue requirement from the March 2001 cost study to develop its line port cost for NECA, and the Commission should direct ACS to employ the corresponding switching revenue requirement to ensure that the line port cost reallocation is revenue neutral.

IV. ACS DID NOT CORRECTLY REALLOCATE TIC REVENUE

In the Order Designating Issues for Investigation, the Commission found that ACS’ treatment of ISP minutes as interstate “also appears to have affected the development of the revenue requirement for the transport category, as well as that for the local switching category.”⁶⁰ The use of an inflated transport revenue requirement in turn “likely would have resulted in overstatement of the TIC revenue requirement.”⁶¹ In response, ACS repeats that “the Rate-of-Return Access Charge Reform Order and MAG Tariff Filing Order did not permit ACS to reallocate its TIC using any cost study other than the one supporting its July 2000 Tariff.”⁶² As GCI demonstrated above, however, neither of these orders, applicable to over 1,300 rate-of-return carriers, superceded the

⁵⁹ Id., Attachment F (“line port costs reported to NECA to be used in NECA tariff development for its December 17 common line tariff filing was \$1,501,194”).

⁶⁰ Order Designating Issues for Investigation at ¶ 17.

⁶¹ Id.

⁶² ACS Direct Case at 17.

Commission's specific mandate in the GCI Order that "until further ordered otherwise by the Commission, [ACS] shall . . . assign to the intrastate jurisdiction for separations purposes the traffic-sensitive costs of carrying ISP traffic." Therefore, ACS' TIC revenue reallocation should be based on a recalculated TIC revenue requirement derived from a recalculated transport revenue requirement, from which the traffic-sensitive costs of ISP-bound traffic are to be excluded.

Moreover, differences in ACS' recalculated TIC costs submitted with the ACS Direct Case and the TIC costs that ACS reported to NECA, which are reported in NECA's Direct Case, demonstrate that a *single* cost study must be employed to ensure that the implementation of rate structure reforms are revenue neutral. Exhibit 1 to NECA's Direct Case reports that \$212,900 in TIC costs are to be reallocated to common line under ACS' recalculated revenue requirement (\$425,800 for a 12-month period).⁶³ However, NECA included \$202,265 in reallocated TIC costs (\$404,530 for a 12-month period),⁶⁴ which amount was based on ACS' submission to NECA that ACS had prepared "[i]n compliance with the GCI Order." Similar differences in TIC reallocation would also be reflected in the rates for local switching, information, and special access. To ensure that all cost reallocations are revenue neutral and that cost levels are just and reasonable, ACS should use its March 2001 cost study for developing all its interstate access rates, not just those rates (or reallocation of costs) that are included in the NECA tariff.⁶⁵

⁶³ NECA Direct Case, Exhibit 1, col. C.

⁶⁴ Id., Exhibit 1, col. F.

⁶⁵ Whether the Commission requires ACS to use the March 2001 cost study or the revised July 2000 cost study submitted with the Direct Case, the same cost study should be used for both traffic-sensitive and non-traffic sensitive rates.

V. THE COMMISSION MUST REQUIRE ACS TO FILE REVISED INTERSTATE ACCESS RATES, EFFECTIVE JANUARY 1, 2002

The rates filed by ACS in its MAG Access Tariff Filing are unjust and unreasonable, and the Commission must require ACS to file revised rates to be effective January 1, 2002. As the Commission stated, this investigation “involves the access charge rates that ACS should be charging in its interstate access tariff.”⁶⁶ According to ACS, the access rates it “should be charging” recover the traffic sensitive costs of ISP-bound traffic from IXCs.⁶⁷ This position is in direct conflict with the Commission’s previous, unambiguous finding that ACS’ assignment of ISP traffic costs to the interstate jurisdiction is unlawful, and the rates developed based on this unlawful practice must be rejected.

Though ACS repeatedly cites the Rate-of-Return Access Charge Reform Order and the MAG Tariff Filing Order as support for its continuing assignment of ISP costs for IXC recovery, nowhere in these orders does the Commission reverse its finding that ACS’ practice is unlawful. When ACS “reclassified ISP traffic costs from the intrastate jurisdiction to the interstate jurisdiction for separations purposes, [it] increased the traffic sensitive costs apportioned to the interstate jurisdiction.”⁶⁸ In doing so, ACS “increased the interstate access rates that GCI had to bear as ISP traffic increased.”⁶⁹ The Commission “has made clear that local exchange carriers *must* assign ISP traffic costs to

⁶⁶ Order Designating Issues for Investigation at ¶ 22.

⁶⁷ See ACS Direct Case at 18-19.

⁶⁸ GCI Order, 16 FCC Rcd at 2842 (¶ 18). As GCI has demonstrated, ACS never “reclassified” the traffic as interstate; it simply included it in *both* jurisdictions.

⁶⁹ Id.

the intrastate jurisdiction for separations purposes,”⁷⁰ and ACS failure to do so in the instant filing is plainly unlawful and resulted in unjust and unreasonable rates.

For example, the ACS switching rate is significantly inflated by this unlawful cost allocation. ACS tariffed a per minute rate of \$0.011373.⁷¹ The recalculated rate, based on a revenue requirement “that complies with the Commission’s decision in GCI v. ACS Holdings, the separations rules and orders cited therein, and the requirements of the Separations Freeze Order,”⁷² is \$0.007840,⁷³ which is significantly lower. It also bears noting that in recalculating this rate, ACS did not use the same interstate DEM for demand as it used to allocate costs. In its Direct Case, ACS reported “Total Interstate MOU” for January 2000 through December 2000 to be 599,661,959, and calculated the interstate DEM factor using these minutes.⁷⁴ However, when ACS recalculated the rate using the revised revenue requirements, it reverted back to the same projected demand figure it used to establish rates for the July 2000 Tariff and the MAG Access Tariff Filing: 505,383,825.⁷⁵ To calculate its revised rates, however, ACS should have used an interstate demand figure that was consistent with its calculation of the interstate DEM

⁷⁰ GCI Order, 16 FCC Rcd at 2843 (¶ 22) (emphasis in original). This requirement had been enforced against other carriers as well. “Common Carrier Bureau Issues Letter to Bell Atlantic Regarding Jurisdictional Separations Treatment of Reciprocal Compensation for Internet Traffic,” Public Notice, 14 FCC Rcd 13148 (Com. Car. Bur. 1999); “Common Carrier Bureau Issues Letter to SBC Regarding Jurisdictional Separations Treatment of Internet Traffic,” Public Notice, 14 FCC Rcd 8178 (Com. Car. Bur. 1999); see also Jurisdictional Separations Order, 16 FCC Rcd at 11399-401 (¶¶ 34-42) (declining to adjust interstate DEM factors to include any ISP minutes prior to the DEM freeze).

⁷¹ If ACS had established its switching rate entirely consistent with its inclusion of ISP costs in the interstate jurisdiction (while excluding the ISP minutes from demand), its switching rate would be \$0.017046. ACS Direct Case, Cost Support, Exhibit 2 at 1.

⁷² Order Designating Issues for Investigation at ¶ 11.

⁷³ ACS Direct Case, Attachment H at 1.

⁷⁴ Id., Attachment C.

⁷⁵ See July 2000 Tariff Filing, D&J, Attachment H at 1 (showing local switching annual demand as 505,383,825); ACS MAG Access Tariff Filing, Cost Support, Exhibit 2 at 1 (same); ACS Direct Case, Exhibit H at 1 (same).

factor for cost allocation purposes. ACS' failure to do so understated demand by almost 100 million minutes, which overstated the local switching rate. The revised rate using demand consistent with the DEM factor would be \$0.0066074.⁷⁶

The Commission should require that revised ACS rates be effective as of January 1, 2002. Section 204 of the Act provides that the Commission may suspend a “charge, classification, regulation or practice” and “enter upon a hearing concerning the lawfulness thereof.”⁷⁷ During the Section 204 hearing, the Commission may also “require the interested carrier . . . to keep accurate account of all amounts received by reason of such charge for a new service or revised charge . . . and upon completion of the hearing and decision may by further order require the interested carrier . . . to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such charge for a new service or revised charges as by its decision shall be found not justified.”⁷⁸ Thus, Section 204 of the Act plainly authorizes the Commission to adjust the rates as of the effective date of the tariff, to the extent that rates and charges filed thereunder are found to be unjust and unreasonable.⁷⁹

ACS was required to revise those interstate access rate elements that would be affected by the reallocation of line port costs from local switching to the common line,

⁷⁶ This demand correction should be reflected as appropriate for all revised rates.

⁷⁷ 47 U.S.C. § 204(a).

⁷⁸ Id.; see also AT&T v. FCC, 487 F.2d 865, 880 (2nd Cir. 1973) (“The Commission may order a refund of the amounts collected during the period that the prior rates, if found to be unlawful, were in effect.”).

⁷⁹ Though ACS claims that the Commission “has discretion whether or not to order refunds in any given tariff investigation” (ACS Direct Case at 20), the Commission has routinely ordered refunds upon finding in an investigation that tariffed rates are unjust and unreasonable. See 2001 Annual Access Tariff Order, 16 FCC Rcd at ¶ 22; 1998 Annual Access Tariff Filings, Memorandum Opinion and Order, 13 FCC Rcd 24001, 24009 (¶ 27) (1998); Tariffs Implementing Access Charge Reform, Memorandum Opinion and Order, 13 FCC Rcd 14683, 14756 (¶ 185), 14757 (¶¶ 188, 189) (1998); Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection through

and by the reallocation of TIC costs. This obligation required ACS to adjust its revenue requirement for essentially each of its interstate access rates,⁸⁰ and as a result, all of its rates were implicated by the ACS MAG Access Tariff Filing. Indeed, ACS has sustained the same unreasonably high local switching rate since 1998, by reporting an inflated switching revenue requirement,⁸¹ and ACS was obligated to revise that rate in its MAG Access Tariff Filing to reflect the elimination of the line port costs it shifted for recovery from NECA's common line tariff.⁸² ACS' failure to revise its inflated local switching rate and its other rates in accordance with the Rate-of-Return Access Charge Reform Order and the GCI Order requires that each of these rates be revised effective January 1, 2002, and that a refund of the difference between the unlawful rates charged since January 1, 2002 and revised rates be issued.

As a final matter, it should be noted that even if ACS were permitted to assign the traffic-sensitive costs of ISP-bound traffic to the interstate jurisdiction, its current rates are still unjust and unreasonable. Though ACS has persisted in assigning these costs to the interstate jurisdiction, *it has never included ISP minutes in the interstate demand used to calculate the rates*. Access rates are calculated by dividing the cost for an element by

Physical Collocation for Special Access and Switched Transport, Second Report and Order, 12 FCC Rcd 18730, 18889 (¶ 392) (1997).

⁸⁰ See generally ACS MAG Access Tariff Filing (setting forth rates).

⁸¹ As competition in Anchorage develops, ACS has a greater incentive to shift as many costs as possible to captive interstate access customers. See Access Charge Reform: Reform of Access Charges Imposed by Competitive Local Exchange Carriers, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, 9935 (¶ 30) ("Thus, once an end user decides to take from a particular LEC, that LEC controls an essential component of the system that provides interexchange calls, and it becomes the bottleneck for IXCs wishing to complete calls to, or carry calls from, that end user."); id. at 9938 (¶ 39) ("we conclude that it is necessary to constrain the extent to which CLECs can exercise their monopoly power and recover an excessive share of their costs from their IXC access customers — and, through them, the long distance market generally.").

⁸² Having sought almost \$2.6 million in line port costs with no corresponding local switching reduction, ACS did not "scrupulously" comply with either order under any interpretation. See ACS Direct Case at 20.

the demand. By including ISP minutes for the allocation of costs but excluding ISP minutes from the demand used to calculate rates, ACS arbitrarily inflates its rates to IXC customers. Should the Commission conclude that ISP costs may be assigned to the interstate jurisdiction, then it must also find that any rates developed based on these costs must be calculated using the ISP demand for the service as well.⁸³

VI. THE COMMISSION SHOULD NOT ISSUE A STAY OF ANY DECISION ORDERED AS A RESULT OF THE ACS TARIFF INVESTIGATION

ACS claims that the Commission should issue a stay of any finding that ACS “should have restated the demand data contained in the cost study supporting its July 2000 Tariff to separate the traffic-sensitive costs of ISP-bound traffic in the intrastate jurisdiction.”⁸⁴ According to ACS, the requested stay “would be consistent with the Commission’s prior actions in the enforcement action that produced the GCI Order.”⁸⁵ ACS is wrong.

The GCI Order requirement that ACS “assign to the intrastate jurisdiction for separations purposes the traffic-sensitive costs of carrying ISP traffic” is in full force and effect, and ACS was and is required to comply with that order. ACS’ request for a stay in that proceeding was limited to the effectiveness of the damages award, and ACS did not request a stay of other relief ordered.⁸⁶ In granting ACS’ limited stay request, the Commission expressly noted that ACS was still obligated “to allocate to the intrastate jurisdiction for separations purposes the costs of carrying [ISP] traffic, and to count each

⁸³ Indeed, ACS has previously pleaded that “it would be far more rational to fulfill the [cost-revenue] matching principle by permitting LECs to charge for ISP-bound traffic under an alternative form of interstate tariff.” ACS Request for Stay, EB-00-MD-016, at 5 (filed Feb. 28, 2001) (“ACS Request for Stay”).

⁸⁴ ACS Direct Case at 21.

⁸⁵ Id. at 22.

minute of an intraoffice call as two [DEM].”⁸⁷ Thus, in continuing to violate the GCI Order, ACS now seeks to protect its ill-gotten gains based on its speculation about some future decision on appeal by the D.C. Circuit Court of Appeals. However, the fact of appeal in the absence of a stay does not excuse ACS from compliance with the Commission’s standing order. Granting a stay now would simply permit ACS to profit from its own extraordinary malfeasance.

Moreover, a refund as a result of this tariff investigation is not akin to damages awarded for overearnings, as ACS suggests. The Commission suspended ACS’ MAG Access Tariff filing and issued an accounting order because that filing “raise[d] substantial questions of lawfulness warranting investigation of ACS’ tariff.”⁸⁸ Should the Commission conclude that the tariff filing indeed was unlawful as filed, then a refund must be ordered.

ACS’ request for stay also suffers from significant procedural deficiencies. First, ACS has failed to articulate that its request meets the standards for a stay.⁸⁹ Second, ACS has not met the Commission’s requirement that a stay be “filed as a separate pleading.”⁹⁰ “Any such request which is not filed as a separate pleading will not be considered by the Commission.”⁹¹ For all these reasons, ACS has presented no basis on which a stay of any order issued in this proceeding could be granted.

⁸⁶ See ACS Request for Stay at 3 (stating that “ACS seeks only to stay the damages aspect of the Order”).

⁸⁷ Stay Order, 16 FCC Rcd at 8169 n.3 (conditioning grant of stay on ACS’ payment of the amount of damages awarded into an interest-bearing escrow account).

⁸⁸ Suspension Order at ¶ 7.

⁸⁹ See Washington Metropolitan Area Transit Comm’n v. Holiday Tours, Inc., 559 F.2d 841, 842-43 (D.C. Cir. 1977) (setting forth required showing for stay).

⁹⁰ 47 C.F.R. § 1.44(e).

⁹¹ Id.

VII. CONCLUSION

Based on the foregoing, the Commission should find that the rates in ACS' MAG Access Tariff Filing are unjust and unreasonable. As a result, the Commission should reject the rates, require ACS to revise its rates to comply with the Rate-of-Return Access Charge Reform Order and the GCI Order, and order a refund, plus interest, from the effective date of the ACS MAG Access Tariff Filing until new rates are implemented.

Respectfully submitted,

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Dated: April 4, 2002

CERTIFICATE OF SERVICE

I, Colleen A. Mulholland, hereby certify that a copy of the foregoing Opposition of General Communication, Inc. to Direct Case of ACS of Anchorage, Inc. was sent this 4th day of April, 2002, by first-class, United States mail, to the following parties:

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